

**U.S. Department of Labor**

Office of Administrative Law Judges  
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In the Matter of :

EARL EDMUND BALL, :  
Claimant, :

v. :

SHAMROCK COAL CO., :  
Employer, :

and :

DIRECTOR, OFFICE OF WORKERS' :  
COMPENSATION PROGRAMS, :  
Party-In-Interest :

.....  
John Hunt Morgan, Esquire  
For the Claimant

Harold Rader, Esquire  
For the Employer

Before: EDWARD TERHUNE MILLER  
Administrative Law Judge

**DECISION AND ORDER -- REJECTION OF CLAIM**

Statement of the Case

This proceeding involves a claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations promulgated thereunder.<sup>1</sup> Since Claimant filed this application for benefits after March 31, 1980, Part 718 applies. This claim is governed by the law

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<sup>1</sup>All applicable regulations which are cited in this Decision and Order are included in Title 20, Code of Federal Regulations, and are cited by part or section only. The Director's exhibits are denoted "D-"; Claimant's exhibits, "C-"; Employer's exhibits, "E-"; and citations to the transcript of the hearing, "Tr."

of the Sixth Circuit of the United States since Claimant was last employed in the coal industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Claimant, Earl Edmund Ball, filed his first claim for benefits on January 27, 1994. (D-37-1)<sup>2</sup> The Director denied the Claimant benefits on July 19, 1994, whereupon Claimant requested a hearing. (D-37-12, D-37-13) In an informal conference, the Director found no evidence of pneumoconiosis or any lung condition resulting from coal mine dust exposure, but found Claimant was totally disabled due to smoking and resulting heart disease. (D-37-32) Claimant filed a timely appeal and the matter was referred to the Office of Administrative Law Judges on June 1, 1995. (D-37-33) A hearing was scheduled for January 30, 1996, then continued until April 25, 1996. However, because of scheduling conflicts, the parties agreed to submit the case on the record. All parties stipulated to 19 ½ years of coal mine employment. On May 28, 1996, Judge Christine McKenna denied benefits, finding that Claimant did not establish the existence of pneumoconiosis. The Judge further noted that the presumption that the pneumoconiosis arose out of coal mine employment was moot, and the Claimant failed to establish total disability, and even if Claimant could establish this element of entitlement, the evidence would not demonstrate that such total disability was due, at least in part, to pneumoconiosis. The Benefits Review Board affirmed Judge McKenna's decision on April 15, 1997. (D-37-37)

Claimant filed a second claim for benefits on December 11, 1998. (D-1) The claim was denied on June 8, 1999, after which a timely appeal was filed. After an informal conference on September 3, 1999, the Director denied benefits, finding that Claimant failed to establish entitlement to benefits. (D-35) Claimant requested a formal hearing on December 16, 1999. (D-36) The claim was referred to the Office of Administrative Law Judges on April 21, 2000.

A formal hearing was held in Knoxville, Tennessee on May 17, 2000. Claimant and Employer were represented by counsel and all parties were afforded a full opportunity to present evidence and argument. Exhibits marked D-1-D-38 were admitted into evidence without objection. The findings and conclusions that follow are based upon an analysis of the entire record, together with applicable statutes, regulations and case law, in relation to those issues which remain in substantial dispute.

### ISSUES

1. Whether, under §725.309, Claimant has shown a material change in conditions since the previous denial of benefits on January 27, 1994, by establishing one element of entitlement that was previously adjudicated against him namely, that Claimant has pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, that Claimant is totally disabled, or that his total disability is due to pneumoconiosis.
2. If there is a material change in conditions, whether Claimant has established all of the elements of entitlement to benefits under Part 718.

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<sup>2</sup>Director's Exhibits from previously admitted evidence are marked "D-37" and followed by the exhibit's number.

## FINDINGS OF FACT AND CONCLUSION OF LAW

### Background, Dependents, and Coal Mine Employment

Claimant, Earl Edmund Ball, was born on June 18, 1945, and has a high school diploma. (D-37-1) For the purpose of augmentation of benefits, Claimant has a dependent wife, Loretta King, to whom he was married on July 10, 1965. (D-37-7) All parties stipulated to 19 ½ years of coal mine employment. The finding was affirmed by the Benefits Appeal Board in its decision dated April 15, 1997. (D-37)

### Duplicate Claim: Material Change in Conditions

The instant claim is a duplicate claim, pursuant to §725.309, because Claimant filed a new claim more than one year after a prior denial and has submitted new evidence to attempt to establish entitlement to benefits. A material change in conditions is defined by the United States Court of Appeals for the Sixth Circuit as a determination, based on all of the new evidence, favorable and unfavorable, not available at the time of the prior claim, that the miner has proved at least one element of entitlement previously adjudicated against him. The new evidence must differ qualitatively from the underlying prior denial. *See Sharondale Corp. v. Ross*, 42, F.3d 993, 19 BLR 2-12 (6<sup>th</sup> Cir. 1994); *accord, Lisa Lee Mines v. Director, OWCP*, [Rutter] 86 F.3d 1358, 20 BLR 2-227 (4<sup>th</sup> Cir. 1996)(*en banc*). If the Claimant establishes a material change, then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Id.*

The Board has recently interpreted the *Ross* standard, holding that “a determination that the miner’s physical condition has worsened is a requisite part of the duplicate claims analysis at 20 C.F.R. § 725.309(d) under *Ross*, and as such shall be applied to all cases arising within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit.” *Flynn v. Grundy Mining Co.*, 21 B.L.R. 1-40, 1-43, (1997).

Because this is a duplicate claim, this tribunal must assess whether Claimant has established a material change in conditions since the last denial on April 27, 1996. In the instant claim, the previous denial was based on the finding that Claimant did not establish any element of entitlement. Therefore, in order to establish a material change in conditions, Claimant must establish, by virtue of the evidence relating to his medical condition after the previous denial, the existence of at least one of the elements. Those elements, which Claimant must prove by a preponderance, are: (1) the miner has pneumoconiosis; (2) the pneumoconiosis was caused by coal mine employment; (3) the miner is totally disabled; and (4) the miner’s total disability is caused by pneumoconiosis. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*)

### *New Medical Evidence*

*New X-ray Evidence*

<b>Exhibit No.</b>	<b>Date of X-ray</b>	<b>Doctor</b>	<b>Qualifications</b>	<b>Interpretation</b>
D-34	10/26/99	Dahhan	B	Negative
D-31	10/26/99	Sargent	BCR/B <sup>3</sup>	Negative
D-14	5/21/99	Sargent	BCR/B	Negative
D-27	5/21/99	Spitz	BCR/B	Negative
D-24	5/21/99	Wiot	BCR/B	Negative
D-13	5/21/99	Hudson	—	Negative

*New Arterial Blood Gas Studies*

<b>Exhibit No.</b>	<b>Date</b>	<b>Doctor</b>	<b>pO<sub>2</sub></b>	<b>pCO<sub>2</sub></b>	<b>Qualifying</b>
D-34	10/26/99	Dahhan	42.9 42.7*	70.3 62.0*	No No
D-8	5/21/99	Hudson	40.4 36.9*	73.0 79.0*	No No

\*During Exercise

*New Pulmonary Function Studies<sup>4</sup>*

<b>Exhibit No.</b>	<b>Test Date</b>	<b>Age/Ht.</b>	<b>Doctor</b>	<b>FEV<sub>1</sub></b>	<b>FVC</b>	<b>MVV</b>	<b>Qualifying</b>
D-34	10/26/99	54/69½"	Dahhan	1.38	2.32	55	Yes
D-28	9/14/99	53/71"	Jordan	1.46 1.93**	2.68 3.58**	—	<b>Yes</b> <b>No</b>
D-25	8/06/99	53/71"	Hudson	1.86	3.12	62	<b>Yes</b>
D-8	5/21/99	53/71"	Hudson	1.53	2.57	74	<b>Yes</b>

\*\*Indicates Post-Bronchodilators

*New Medical Reports*

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<sup>3</sup>The abbreviation "BCR" denotes board-certified radiologist and the abbreviation "B" denotes a NIOSH-certified B-reader.

<sup>4</sup>All of the studies were conforming.

Dr. A.R. Hudson, board-certified in internal medicine and pulmonary disease,<sup>5</sup> examined Claimant on May 21, 1999. The doctor recorded Claimant's medical and social histories, performed specified medical tests, a physical examination, and interpreted an x-ray film as negative for pneumoconiosis. The arterial blood gases were non-qualifying. The doctor noted that Claimant's effort in his pulmonary function studies, which produced qualifying results, was fairly good, but inconsistent.<sup>6</sup> Dr. Hudson opined that Claimant had chronic obstructive bronchitis from smoking, which made him totally disabled from performing his usual coal mining employment. The doctor noted that he found no evidence of coal worker's pneumoconiosis. (D-8, D-11, D-13)

Dr. Manley Jordan, board-certified in internal medicine, pulmonary disease, and critical care medicine, treated Claimant on August 20, 1998 and recorded his medical and social histories, examined Claimant, and performed specified tests. Additionally, Dr. Jordan interpreted an x-ray which showed chronic scarring, noting it was "plus or minus component of CWP." The doctor diagnosed Claimant with chronic obstructive pulmonary disease. Dr. Jordan admitted Claimant to the hospital for COPD exacerbation after his examination. The doctor made no determinations as to the cause of Claimant's disability or its extent. In a follow-up examination of Claimant on September 14, 1998, Dr. Jordan noted that Claimant had a severe to moderate obstructive ventilatory impairment. (D-28)

Dr. A. Dahhan, board-certified in internal medicine and pulmonary disease, examined Claimant on October 26, 1999. The doctor recorded Claimant's social and medical histories, performed pulmonary function tests and arterial blood gas studies, a physical examination, and interpreted an x-ray film as negative for coal worker's pneumoconiosis, but positive for emphysema. The blood gas studies resulted in nonqualifying results. The results of the pulmonary function studies, however, produced qualifying results. The doctor noted Claimant's cooperation was fair. Dr. Dahhan found no evidence of pneumoconiosis or other pulmonary problems related to coal dust exposure. The doctor determined that Claimant does not have the respiratory capability to return to his previous coal mine work. Dr. Dahhan opined that Claimant has chronic obstructive airway disease. (D-32)

### *The Existence of Pneumoconiosis*

Benefits under the Act are awarded to persons who are totally disabled within the meaning

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<sup>5</sup>This tribunal takes judicial notice of any doctors' qualifications not in evidence but that are disclosed on the worldwide web, American Board of Specialties Public Education Program, Verification of Certification Results, at [www.certifieddoctors.com](http://www.certifieddoctors.com). With the exception of Dr. William H. Anderson, whose credentials appear in his deposition (D-37-21, p. 6 of deposition), all of the doctors qualifications were located.

<sup>6</sup>Dr. J. Michos, certified in internal medicine and pulmonary disease, interpreted the ventilatory studies as unacceptable because there was less than optimal effort and cooperation; a greater than 5% variation between the two best FVC values, and 10% variation between the two best MVV values. (D-9)

of the Act due to pneumoconiosis. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions, which are set forth in §§718.304, 718.305, 718.306; (4) or a finding by a physician of pneumoconiosis as defined in §718.201, which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy, and the presumptions under §§718.304, 718.305, and 718.306 are inapposite because there is no evidence of complicated pneumoconiosis, because the claim was filed after 1981, and because miner is living.

All of the recent x-ray interpretations have been read as negative for pneumoconiosis. Thus, Claimant has not established pneumoconiosis pursuant to §718.202(a)(1). A determination of the existence of pneumoconiosis may be made pursuant to §718.202(a)(4) if a physician, notwithstanding a negative x-ray, finds that the miner has pneumoconiosis as defined in §718.201. Any such finding must be based on objective medical evidence, and medical and work histories, and be supported by a reasoned medical opinion.

Dr. Hudson examined Claimant on May 21, 1999 and found no evidence of coal worker's pneumoconiosis, opining that Claimant has chronic obstructive bronchitis due to smoking. Dr. Jordan's reports indicate a finding of chronic obstructive disease but no evidence that his condition is due to coal dust exposure. Dr. Dahhan examined Claimant on October 26, 1999 and found no evidence of pneumoconiosis or pulmonary condition related to coal dust exposure. None of the recent medical opinions of record indicate a finding of pneumoconiosis. Accordingly, Claimant has failed to establish pneumoconiosis pursuant to §718.202(a)(4), and thus, has not established pneumoconiosis pursuant to §718.202(a).

Because Claimant was employed in the coal mines for more than ten years he is entitled to the presumption under §718.302. However, because he has failed to establish the existence of pneumoconiosis, the issue is moot.

### *Total Disability*

To establish total disability, Claimant must prove that he is unable to engage in either his usual coal mine work or comparable and gainful work as defined in §718.204. Section 718.204(c) provides that the criteria for determining whether a miner is totally disabled are: (1) pulmonary function tests qualifying under applicable regulatory standards; (2) arterial blood gas tests qualifying

under applicable regulatory standards; (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure; or (4) the reasoned medical opinion of a physician relying upon medically acceptable clinical and laboratory diagnostic techniques which concludes that a claimant suffers from a disabling respiratory or pulmonary condition which prevents him from performing his usual coal mine work or comparable work.

Claimant has not established total disability pursuant to §718.204(c)(2) or (3) because none of Claimant's recent blood gas studies produced qualifying results, and there is no evidence of cor pulmonale with right sided congestive heart failure. However, Claimant has established total disability pursuant to both §718.202(c)(1) and (4). All four of Claimant's recent pulmonary function studies produced qualifying results.<sup>7</sup> Thus, Claimant has established total disability pursuant to §718.202(c)(1). Additionally, the doctors who made a determination as to the extent of Claimant's disability, determined that Claimant is totally disabled and unable to resume his usual coal mine work. Both Drs. Dahhan and Hudson have superior qualifications and both doctors' reports were well reasoned and well documented.

Accordingly, because Claimant has established at least one of the elements previously adjudicated against him, he has established a material change in conditions pursuant to §725.309.

#### *Previous Medical Evidence*

##### *X-rays*

Between February 27, 1993 and December 15, 1995 there were twenty-five x-ray readings of nine x-rays; twenty were interpreted as negative for pneumoconiosis. The last positive reading was in October of 1993. All of the physicians with negative interpretations have superior qualifications: nine readings were by board-certified radiologists and B-readers and five were by B-readers. Of the five positive readings, three were by B-readers and one by an A-reader.

##### *Pulmonary Function Studies\**

<b>Exhibit No.</b>	<b>Date</b>	<b>Physician</b>	<b>FEV1</b>	<b>MVV</b>	<b>FVC</b>	<b>Qualifying</b>
<b>Cooperation</b>						
D-37-21	2/27/93	Wright	1.93	—	3.35	No
						Good; not optimal effort

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<sup>7</sup>Even if the test that Dr. Michos deemed invalid was excluded the remaining studies produced qualifying results.

D-37-21	3/9/93	Anderson	1.57	—	2.48	No	Good
C-1	3/10/93	Baker	1.94	—	3/19	No	—
D-37-21	8/23/93	Myers	2.11	—	2/73	—	Results invalid due to excessive variability
D-37-21	10/5/93	Lane	1.75	—	2.78	—	Test invalid
D-37-6	3/7/94	Baker	1.62	84	2.86	No	Fair
D-37-22	11/11/94	Dahhan	1.74 2.36**	63 —	2.98 4.15**	—	Invalid due to poor effort

\*All of the studies were conforming

\*\* post- Bronchodilators

#### *Arterial Blood Gas Studies*

<b>Exhibit No.</b>	<b>Date</b>	<b>Doctor</b>	<b>pCO2</b>	<b>pO2</b>	<b>Qualifying</b>
D-37-21	2/27/93	Wright	42	79	No
C-1	3/10/93	Baker	41	78.6	No
D-37-21	10/5/93	Lane	42	73	No
D-37-9	3/7/94	Baker	43	87	No
D-37-22	11/11/94	Dahhan	42 39*	74 83*	No No

\*During Exercise

#### *Medical Opinions*

Dr. Ballard D. Wright, board-certified in anesthesiology and pain management, examined Claimant on February 27, 1993, in connection with his application for workers' compensation benefits. The doctor noted Claimant's medical and social histories, including Claimant's significant coal mine work and history of smoking a pack of cigarettes a day for twenty years. Dr. Wright also interpreted an x-ray as positive for pneumoconiosis. The doctor diagnosed Claimant with coal workers' pneumoconiosis, early stages, chronic bronchitis, without impairment, hypertension, and obesity. Dr. Wright interpreted his pulmonary function results as showing a moderate obstructive and mild restrictive impairment due to Claimant's smoking and obesity, although he noted that the contribution of dust inhalation could not be excluded. However, Dr. Wright opined that the study might be invalid because the patient did not give optimal effort. Although the x-ray revealed early simple pneumoconiosis, the doctor opined that Claimant's examination and non-qualifying blood gas studies indicate that Claimant is able to do his usual coal mine work or comparable work. (D-



37-21)

On March 9, 1993, Dr. William H. Anderson, who is board-certified in internal medicine and pulmonary disease, examined the Claimant. The doctor took Claimant's social and medical histories, interpreted a chest x-ray as negative for pneumoconiosis, and performed specified medical tests. Dr. Anderson noted that the ventilatory tests indicated a "Class 4" pulmonary impairment, which he stated meant "50-100%" impairment. The doctor concluded that Claimant did not have an occupational lung disease, but that he was unable to return to his usual coal mine employment or comparable work. (D-37-21) In his deposition for the state compensation claim, Dr. Anderson testified that Claimant's pulmonary function studies results were the result of cigarette smoking and cardiovascular disease. (D-37-21, p. 9 of deposition)

Dr. Glen Baker, board-certified in internal medicine and pulmonary disease, examined Claimant on March 10, 1993. The doctor performed a physical examination, recorded Claimant's social and medical histories, read an x-ray, and performed specified medical tests. Based upon his positive interpretation of a chest x-ray and Claimant's significant coal mine employment, Dr. Baker diagnosed Claimant as positive for pneumoconiosis. The doctor also noted that the pulmonary function studies revealed a "moderate restrictive ventilatory effect" and "mild resting arterial hypoxemia." Dr. Baker also diagnosed Claimant with chronic obstructive disease, with mild obstruction, and bronchitis. The doctor opined that due to his pulmonary impairment, Claimant was unable to do his usual coal mine work or comparable gainful work. (C-1)

Dr. John E. Myers, board-certified in internal medicine and pulmonary disease, examined the Claimant on August 23, 1993, recording his social and medical histories, interpreting an x-ray, and performing specified tests. Dr. Myer's interpreted an x-ray as positive for pneumoconiosis, diagnosing silicosis, category 1/1, with chronic obstructive pulmonary disease and hypertensive vascular disease. The doctor opined that the ventilatory study revealed restrictive and obstructive defects in ventilation, although the study was "not quite valid" because of variability. Dr. Myer's opined that Claimant's exposure to coal mine dust was a significant contributing factor to his impairment. The doctor noted that Claimant was unable to perform his usual coal mine work due to his pulmonary impairment. (D-37-21)

On October 5, 1993, Dr. Emery Lane, board-certified in internal medicine and pulmonary disease, examined Claimant, noting his significant coal mine employment and cigarette smoking histories. The doctor answered questions by checking boxes a form provided by the Department of Workers' Claims, Kentucky Workers' Compensation Board. The doctor read an x-ray as positive for pneumoconiosis, 1/0, noting by marking the form, that the "miner has an occupational lung disease caused by his coal mine employment based upon xray [sic]." The ventilatory studies showed reduced results, which the doctor deemed invalid. Dr. Lane did not answer the questions on the form regarding the extent of Claimant's ability or his ability to perform his usual employment, and the cause of his impairment. (D-37-21)

Dr. Baker examined Claimant again one year later on March 7, 1994 and modified his diagnosis. The doctor recorded Claimant's social and medical histories, interpreted an x-ray, and performed specified medical tests. Dr. Baker, a B-reader, read the x-ray as 0/1, which is not

evidence of pneumoconiosis. §718.102(b) (D-37-11) The doctor opined that the ventilatory studies revealed a moderate to severe obstructive pulmonary disease and noted that Claimant's symptoms indicated COPD and bronchitis. Dr. Baker attributed Claimant's impairments to his history of cigarette smoking and coal dust exposure. The doctor also diagnosed ischemic heart disease or arteriosclerotic heart disease. Dr. Baker did not indicate the extent of Claimant's disability. (D-37-8)

Dr. A. Dahhan, board-certified in internal medicine and pulmonary disease, examined Claimant on November 1, 1994. The doctor recorded Claimant's medical and social histories, interpreted an x-ray as negative, and performed specified tests. Dr. Dahhan stated that he experienced difficulty obtaining a valid spirometry due to Claimant's poor effort. The doctor noted the Claimant's effort did not improve after the administration of bronchodilators. Dr. Dahhan found the lung volume entirely normal or greater than normal without any restrictive defect. The doctor read an x-ray as negative for pneumoconiosis. Based upon his examination, x-ray reading, and tests, Dr. Dahhan opined that the Claimant exhibited no evidence of occupational pneumoconiosis or pulmonary disability, which was attributable to coal dust exposure. Dr. Dahhan noted that the Claimant has hypertension, anxiety, depression, and sinusitis, all unrelated to coal dust exposure. The doctor concluded that the Claimant retained the physical capacity to perform his usual coal mine employment. (D-37-22)

On July 18, 1995, Dr. Gregory Fino, board-certified in internal medicine and pulmonary disease, reviewed Claimant's medical reports in the record up until that date, except for the report by Dr. Baker of March 10, 1993. Dr. Fino concluded that Claimant does not suffer from an occupationally acquired pulmonary condition arising out of coal mine dust exposure. Dr. Fino's conclusion was based upon the weight of x-ray interpretations, which were read as negative; pulmonary function studies revealed a purely obstructive defect, without restrictive defect; the obstruction was reversed with bronchodilators; Claimant's medication was for a reversible lung disease; no impairment in oxygen transfer in the lungs; Claimant's elevated lung volumes were typical of emphysema, asthma, chronic obstructive pulmonary disease, with pulmonary emphysema due to smoking and a "significant broncho spastic component consistent with emphysema." Dr. Fino attributed Claimant's condition to his history of cigarette smoking and genetics. The doctor noted that Claimant was not totally disabled and was able to perform his usual coal mine employment. (E-1)

### *Existence of Pneumoconiosis*

The existence of pneumoconiosis can be established by x-ray pursuant to §718.202(a)(1). The overwhelming majority of the x-rays were interpreted as negative for pneumoconiosis. There are twenty-nine x-ray interpretations of record. Twenty-four x-ray readings were negative for pneumoconiosis, and five were read as positive for pneumoconiosis. In reviewing the evidence, when evaluating chest x-rays, an administrative law judge may assign greater weight to physicians with superior radiographic qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-213 (1985). Of the negative readings, thirteen were interpreted by board-certified radiologists who were B-readers, and five were interpreted by physicians who were B-readers. Of the positive readings, three were interpreted by B-readers and one by an A-reader. Additionally, it is within the discretion

of the administrative law judge to defer to the numerical superiority of negative readings, though he is not required to do so. See *Scheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666 (1984). This tribunal finds that the clear weight of the x-ray readings, based on the numeric superiority of the readings and the readers' credentials, indicates that Claimant does not have pneumoconiosis by x-ray. Thus, Claimant has not established the disease pursuant to §718.202(a)(1).

The record contains no evidence of a biopsy, and the presumptions under §§718.304, 718.305, and 718.306 are inapposite because there is no evidence of complicated pneumoconiosis, because the claim was filed after 1981, and because miner is living. Thus, Claimant has not established pneumoconiosis pursuant to §§718.202(a)(2) and (3).

Section 718.204(a)(4) provides that a Claimant may establish the existence of pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the claimant has pneumoconiosis. In evaluating the opinions of physicians, the administrative law judge must initially determine whether each medical report of record relevant to the issue was reasoned and documented, and must provide reasons for discounting opinions, as required by the APA.<sup>8</sup> A reasoned medical opinion is one in which the physician sets forth the evidence he relies upon in reaching his conclusions. See *Fields v. Island Creek Coal Co.*, 10 BLR 1019 (1987).

Of the ten doctors' reports of record, four reports opine that Claimant has pneumoconiosis or an occupational lung disease. However, this tribunal finds those reports unpersuasive because they not well reasoned. The reports of Drs. Wright, Baker and Myers based their 1993 conclusions in large part on their own positive x-ray interpretations that were later read by well qualified physicians as negative. Drs. Wright, Baker, Myers, and Lane all noted Claimant's significant history of cigarette smoking, although none of the doctors assessed it as a factor in his report. A doctor's failure to assess relative contributions of multiple etiologies may diminish the probative value of his opinion. See *Gouge v. Director, OWCP*, 6 BLR 1-307, 1-309 (1985). A doctor's report may be rejected because the doctor did not explain how he could distinguish between disability caused by coal mining and disability by smoking. See *Gilliam v. G & O Coal Co.*, 7 BLR 1-59 (1984); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990). Additionally, Drs. Wright, Baker, Myers, and Lane provided their reports on state worker's compensations forms, merely marking a box in response to diagnostic inquiries, which is noteworthy because the standard forms included little to no explanations. Dr. Lane's report is especially conclusory and noted only that he interpreted an x-ray as positive for pneumoconiosis.<sup>9</sup> Thus, because Drs. Wright, Baker, Myers and Lane's reports are not well reasoned this tribunal does not find them persuasive.

Of the six physicians' reports remaining, five of the reports were well documented and well reasoned. Four of the five doctors, Drs. Hudson, Jordan, Dahhan, and Fino, considered Claimant's

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<sup>8</sup>U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).

relevant coal mine employment and his significant history of cigarette smoking. The doctors each based their conclusions upon Claimant's history, physical examinations and records, specified medical tests, and x-ray interpretations. Dr. Anderson's report, however, is not well reasoned, because similarly to Drs. Wright, Baker, Myers, and Lane, the doctor's report is conclusory, and was limited to checking boxes on a form, without explaining what he relied upon in making his diagnosis. Still, excluding Dr. Anderson's report, five well reasoned and well documented physicians' reports remain in the record. Additionally, the three reports from Claimant's most recent medical examinations are among the five well reasoned and documented reports finding no pneumoconiosis. This tribunal finds the reports of Drs. Hudson, Jordan, Dahhan, and Fino to be the most persuasive of record.<sup>10</sup> Thus, the weight of well reasoned and well documented physicians' reports indicates that Claimant does not have pneumoconiosis.

Additionally, experts' qualifications are important indicators of the reliability of their opinions. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323. There are four doctors who determined that Claimant has an occupationally acquired pulmonary impairment. Of the four, only Dr. Baker, who is board-certified in internal medicine and pulmonary disease, has superior qualifications. Drs. Myers and Lane are board-certified only in internal medicine and Dr. Wright has no pulmonary related certification. Of the five physicians in the record that determined Claimant does not have pneumoconiosis, all five physicians, are board-certified in both internal medicine and pulmonary disease, and thus, have superior qualifications. Therefore, the predominant weight of the well reasoned and documented opinions by physicians with superior qualifications, indicates that Claimant does not have pneumoconiosis. Accordingly, this tribunal finds that Claimant has not established the existence of pneumoconiosis by medical opinion pursuant to §718.202(a)(4).

The finding of 19 ½ years of coal mine employment was affirmed by the Benefits Review Board. (D-37-37) However, because this tribunal has determined that Claimant does not have pneumoconiosis, the question of a causal nexus between Claimant's pulmonary disease and his employment is moot. Therefore, for this reason, the presumption under §718.302 has been adequately rebutted, and thus there is insufficient evidence to conclude that a causal connection exists.

### *Total Disability*

As noted above, § 718.204(c) provides that the criteria for determining whether a miner is totally disabled are: (1) pulmonary function tests qualifying under applicable regulatory standards,

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<sup>10</sup>All of the doctors who determined Claimant does not have pneumoconiosis personally examined Claimant except for Dr. Fino, who reviewed specified medical records. However, Dr. Fino provided a well reasoned and documented report. His report, while not as persuasive as the reports of Drs. Dahhan, Hudson, or Jordan, who examined Claimant and wrote well reasoned reports, is more persuasive than the reports of Drs. Wright, Baker, Myers, Lane and Anderson, physicians who examined Claimant but provided reports that are not well reasoned.

(2) arterial blood gas studies qualifying under applicable regulatory standards, (3) proof of pneumoconiosis and cor pulmonale with right sided congestive heart failure, or (4) proof of a disabling respiratory or pulmonary condition on the basis of the reasoned medical opinion of a physician relying upon medically accepted techniques. If there is contrary evidence in the record, all evidence must be weighed as a whole to determine whether there is proof by a preponderance of the evidence that the miner is totally disabled. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

In weighing the conforming and valid pulmonary test results, this tribunal has determined that Claimant has established total disability pursuant to §718.204(c)(1). In previous denial of benefits, Judge McKenna determined that although some of the studies produced qualifying results, the “unreliability of the tests as a whole makes it unreasonable to conclude that they establish disability.” (C-37-53) However, since that denial, Claimant’s most recent pulmonary function studies produced qualifying results indicating that Claimant is totally disabled. There are three recent valid pulmonary function studies that indicate Claimant is totally disabled, one of which is arguably invalid, and five previous studies which were invalid. Only one of the studies indicated nonqualifying results. Thus, the clear weight of the evidence indicates that Claimant has established total disability by qualifying pulmonary function studies. Claimant has not, however, established total disability pursuant to §718.204(c)(2) or (3), because all of the arterial blood gas studies of record produced nonqualifying results, and the record contains no evidence of cor pulmonale with right sided heart failure.

Total disability may also be found if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner’s respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable gainful employment, pursuant to §718.204(c)(4). Of the three physicians who recently examined Claimant, Drs. Dahhan and Hudson both opined that he is totally disabled and unable to perform his usual coal mine employment or comparable work. The third doctor, Dr. Jordan, did not make a finding as to the extent of Claimant’s disability. Of the previous medical opinions of record, Dr. Anderson, Baker, and Myers also concluded that Claimant is totally disabled. However, this tribunal has found the reports of Drs. Anderson, Baker, and Myers to be unpersuasive because they are not well reasoned. Thus, there are two well reasoned recent medical reports that opine Claimant is totally disabled.

The record also includes previous medical reports from Drs. Wright, Dahhan, and Fino, who determined that Claimant was not totally disabled, and a fourth report from Dr. Lane who did not make a determination as to the extent of Claimant’s disability. As previously stated, the opinions of Drs. Wright and Lane are not well reasoned and therefore, unpersuasive. Thus, there are two well reasoned and well documented opinions by physicians with superior qualifications that determined Claimant is not totally disabled, and two recent well-reasoned and documented opinions by physicians with superior qualifications that determined Claimant is totally disabled. However, those reports include contradictory opinions by Dr. Dahhan, who’s most recent report determined that Claimant is totally disabled. This tribunal finds his recent opinion to be more persuasive, because Claimant’s impairment has progressed, as evidenced by his more recent pulmonary studies. And, even if the reports of Dr. Dahhan were not included, Dr. Fino did not personally examine the Claimant, and thus

his opinion is less persuasive than the opinion of Dr. Hudson, an examining physician. Thus, this tribunal finds that the weight of medical opinions indicates that Claimant is totally disabled, pursuant to §718.204(c)(4).

As part of §718.204, Claimant must establish by a preponderance of evidence that his total disability is due at least in part to pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 825 (6<sup>th</sup> Cir. 1989). Because Claimant has not established the existence of pneumoconiosis, he cannot establish that his total disability is attributable in any part to the disease, and no causal connection between the disease and his disability has been established.

#### Attorney's Fee

The award of an attorney's fee under the Act may be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

#### **ORDER**

The claim of Earl Edmund Ball for benefits under the Act is hereby denied.

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EDWARD TERHUNE MILLER  
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.